

CALVIN L. HOWARD

IBLA 71-98

Decided June 30, 1972

Appeal from decision (MN 0485150) by chief, branch of lands, Santa Fe, New Mexico, dated October 19, 1970, rejecting final proof and cancelling entry.

Reversed and remanded.

Desert Land Entry: Applicants -- Desert Land Entry: Assignments

The requirement of 43 U.S.C. § 325 (1970) that a desert land entryman "be a resident citizen of the State \* \* \* in which the land \* \* \* is located" applies only to the time when the original entry is made. It is not a continuing requirement, co-extensive with the life of the entry, but one which merely exists at the time the entry is made. However, the assignee of a desert land entry must show that he is a resident citizen of the state in which the land is situated as of the time of the assignment.

Contests and Protests: Generally -- Desert Land Entry: Final Proof --  
Rules of Practice: Evidence

Hearings --

A report of field examination is not evidence on which a desert land final proof may be rejected and the entry cancelled. Where final proof asserts full compliance with the law, and its showings are questioned, a contest complaint should be initiated to afford the entryman an opportunity for a hearing.

APPEARANCES: Walter Parr, Esq. of Garland, Martin & Martin, for the appellant.

OPINION BY MR. FISHMAN

Calvin L. Howard, assignee of desert land entry NM 0485180, has appealed from a decision, dated October 19, 1970, rendered

by the chief, branch of lands, Santa Fe, New Mexico, rejecting his final proof and cancelling the entry.

The decision, based upon three reports of field examinations, found that: (1) the appellant is not a resident citizen of New Mexico; (2) no permanent-type pumping equipment has been installed at certain wells on the entry; (3) no irrigation water had ever been run through the irrigation ditch; and (4) the irrigation system was not permanently installed.

Although we find it necessary to remand the record for a hearing for the reasons shown infra, we believe that the first ground upon which the decision below relied warrants discussion.

The first ground is based upon 43 U.S.C. § 325 (1970), which reads as follows:

Excepting in the State of Nevada, no person shall be entitled to make entry of desert lands unless he be a resident citizen of the State or Territory in which the land sought to be entered is located.

The requirement of resident citizenship is not satisfied by the mere intention to establish residence. Bessie R. McDonald (On Rehearing), 51 L.D. 401 (1926). The requirement is not a continuing one, coextensive with the life of the entry but merely one which must exist at the time the entry is made. Lacy v. Woodbury, 49 L.D. 114 (1922). The resident citizenship qualification is satisfied where a person established his residence in the state in which the land is situated and his acts indicated a bona fide intent to make his future home in that state, although he thereafter temporarily maintained his residence elsewhere. Id. However, an assignee of a desert land entry must be a resident citizen of the state in which the land lies as of the time of the assignment. 1/

As the appeal clearly demonstrates, a report of field examination is not evidence upon which a final proof may be rejected and the entry cancelled. Johnnie E. Whitted, Bill Smith, 61 I.D.

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1/ Fred W. Kimble, 20 L.D. 67 (1895) is no longer controlling since the 1908 amendment to the desert land laws, embodied in 43 U.S.C. § 324 (1970) makes explicit that an assignee of a desert land entry must have the same qualifications as an original entryman.

172, 174 (1953). Where final proof asserts full compliance with applicable law and its showings are questioned by the Bureau of Land Management, it is error to reject the final proof based upon reports of field examination which tend to controvert the prima facie showings of the final proof. Rather, it is necessary to initiate a contest to afford the claimant an opportunity to be heard. See Don E. Jonz, 5 IBLA 204 (March 20, 1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is reversed and the case remanded to the Bureau of Land Management for appropriate action consistent with this decision.

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Frederick Fishman, Member

We concur:

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Anne Poindexter Lewis, Member

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Edward W. Stuebing, Member

